ONTARIO

REPORT

of the

ONTARIO LAW REFORM COMMISSION

to

THE ATTORNEY GENERAL FOR ONTARIO

on

CERTAIN ASPECTS OF THE PROPOSED DIVORCE LEGISLATION CONTAINED IN BILL C-187

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The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act, 1964*, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. Allan Leal, Q.C., LL.M., LL.D., *Chairman*
Honourable James C. McRuer, LL.D.
Honourable Richard A. Bell, P.C., Q.C.
W. Gibson Gray, Q.C.
William R. Poole, Q.C.

Dr. Richard Gosse, Q.C., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are at Room 470, Parliament Buildings, Toronto, Ontario, Canada.

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ONTARIO LAW REFORM COMMISSION

PARLIAMENT BUILDINGS
TORONTO 2

To: The Honourable A. A. Wishart, Q.C.,

Minister of Justice and
Attorney General for Ontario.

Dear Mr. Attorney:

Pursuant to the provisions of section 2 (1) (*a*) of *The Ontario Law Reform Commission Act, 1964*, the Commission has considered the consequences in the Province of Ontario of the enactment by the Parliament of Canada of Bill C-187, which was passed by the House of Commons on December 19th, 1967, and is now before the Senate.

Particularly in view of its project on Family Law, the Commission has a special interest in this field. Certain aspects of Bill C-187, in the opinion of the Commission, urgently require further consideration. It is the purpose of this Report to draw these matters to your attention.

The matters deal with:

I County Court Jurisdiction

II The Law of Annulment of Marriage

III Ancillary Relief

IV Domicile

Bill C-187 is based on the Report of The Special Joint Committee of the Senate and House of Commons on Divorce (hereinafter referred to as the Joint Report) which was released last June.

I County Court Jurisdiction

The Joint Report recommended (at pages 149-151) that the county and district courts have jurisdiction in divorce matters. The Commission agrees with that recommendation. Divorce litigation generally could be dealt with more effectively and more cheaply in the county and district courts. It is more likely that the same judge will preside

throughout the proceedings at the county and district court level and this should be in the interests of those concerned. He would normally be in a position to give continuing supervision and review over such matters as maintenance and custody. These are matters which cannot be handled expeditiously or readily by judges of the Supreme Court on assize. The Commission also agrees with the Joint Report that the High Court should continue to have jurisdiction as well and that the parties should be entitled to have their trial heard in the High Court if one of them so desires.

Bill C-187 does not follow the Joint Report in this regard. Jurisdiction in Ontario is conferred on "the trial division or branch of the Supreme Court". (See section 2 (*e*) (i).) In this respect, the Bill would have been more accurate had "court" been defined, for Ontario purposes, as the branch of the Supreme Court of Ontario, which is known as the High Court of Justice for Ontario. Such a definition would be based on section 3 of *The Judicature Act* (R.S.O. 1960, c. 197) which states:

> "3. The Supreme Court shall continue to consist of two branches, the Court of Appeal for Ontario and the High Court of Justice for Ontario".

The Supreme Court does not have a division which is formally known as a "trial" division and the High Court does, of course, have jurisdiction in matters other than the hearing of trials.

Although the county and district court judges will not be given jurisdiction under the proposed legislation, it is clear that the same result can be achieved by provincial legislation. The county and district court judges could be given jurisdiction by the Province in their capacity as local judges of the Supreme Court. This approach was adopted recently in British Columbia and has been upheld in the Supreme Court of Canada. (See *Attorney General of British Columbia* v. *McKenzie*, [1965] S.C.R. 490.)

Section 115 of *The Judicature Act* makes all county and district court judges, except in the County of York, local judges of the High Court. The local judges receive their jurisdiction from other statutory authority or from the rules (See, for example, Rules 211-214).

The Commission recommends that *The Judicature Act* be amended so as to confer express jurisdiction in matrimonial causes on local judges of the High Court. (In British Columbia, local judges were expressly given jurisdiction in divorce matters. See the *Supreme Court Amendment Act, 1964*, S.B.C. 1964, c. 56, s. 3.) The change should be subject to the right of any party to the proceedings to have the action heard by a judge of the High Court (other than a local judge).

The only difficulty that appears in this regard is the definition of "court" in Bill C-187, referred to earlier. There might be some argument that the use of the term "trial division or branch of the Supreme Court" would exclude local judges. In order to ensure that local judges

could be given jurisdiction by provincial legislation, the definition of "court" in Bill C-187 should be revised so that it refers to the High Court of Justice for Ontario.

Section 115, as mentioned above, excepts county court judges in the County of York from its application. The Commission recommends that section 115 be amended to omit this exception. All county and district court judges should have jurisdiction in matrimonial matters for the reasons set forth in the Joint Report.

II The Law of Annulment of Marriage in Ontario

Bill C-187 creates special difficulties for Ontario with respect to the law of annulment of marriage. By section 26 the federal *Divorce Act* (Ontario) of 1930 would be repealed. That statute made applicable to this province the law on this subject as it existed in England in 1870.

Marriages may be void or voidable. A void marriage is one that has never existed at all. No decree is needed to set it aside, although for practical purposes one may be obtained. It may be necessary to resolve some doubt whether the marriage is void or it is essential if the wife wishes to obtain ancillary relief in the way of maintenance (See ss. 1 and 2 of *The Matrimonial Causes Act*, R.S.O. 1960, c. 232). A voidable marriage is regarded as valid until it is declared to be void, at which time it is regarded as void *ab initio* for most purposes. A decree must be obtained to set aside a voidable marriage. The distinction between void and voidable marriages so far as the legitimacy of children born to such marriages may be observed in *The Legitimacy Act, 1961-62* (S.O. 1961-62, c. 71).

In Ontario, probably the only remaining ground which creates a voidable marriage is impotency. On the other hand marriage in this province may be void *ab initio* for any of the following:

I Legal incapacity

1. Lack of age
2. Prior subsisting marriage
3. Mental incompetency
4. Consanguinity or Affinity

II Lack of Consent

(Mental incompetency has been classified as a matter of Legal Incapacity).

1. Mistake
2. Fear and Duress

III Formal Defects

Formal defects are those that take place in the licensing procedure, the publication of banns or in the solemnization of the marriage. This is very limited in view of section 46 of *The Marriage Act* (R.S.O. 1960,

c. 228) which gives validity if the marriage is solemnized in good faith, notwithstanding the person who solemnized the marriage had no authority to do so, or where there is an absence or irregularity in the publication of banns or the issuing of the licence.

Prior to 1930, the Supreme Court of Ontario repeatedly declined to entertain annulment actions, except in the case of marriages celebrated in contravention of the then Ontario *Marriage Act*, which required parental consent of those under 18. The provincial statute provided that marriages which contravened the requirement should be void. Although this provision was held constitutionally valid (See *Kerr* v. *Kerr and Attorney General of Ontario*, [1934] S.C.R. 72) on the ground that the age requirement was a formal prerequisite to the marriage, rather than a matter of capacity, it was repealed in 1932 by *The Statute Law Amendment Act, 1932* (S.O. 1932, c. 53, s. 17).

With respect to the position prior to 1930, there are two issues:

1. Was the law of England as to annulment, as administered by the ecclesiastical courts in 1792, received into the law of Upper Canada in 1792?

2. Did any court within the province have jurisdiction to administer such a law, if it was so received?

In facing these questions, the final position taken by the Ontario courts was that the first need not be answered because the answer to the second was, even if the answer to the first was affirmative, the courts nevertheless had no jurisdiction. (See *Reid* v. *Aull* (1914), 32 O.L.R. 68 and *Vamvakidis* v. *Kirkoff* (1929), 64 O.L.R. 585.)

However, there was earlier case law which indicated that the ecclesiastical law on marriage had been received in 1792. This view was taken by R. R. Evans in his learned treatise, The Law and Practice Relating to Divorce, published in 1923, where the cases are discussed. (See pages 92-102.)

Furthermore, there is ground for criticism of the position taken by the Ontario Court of Appeal that no Ontario court had jurisdiction. (See Evans, 104-115 and Power, 2nd ed., at pp. 14-20.)

These problems posed by these questions were resolved (for the time being) by the federal *Divorce Act* (Ontario) of 1930 which, *inter alia*, made the law of annulment in England as of July 15th, 1870, applicable in Ontario and conferred jurisdiction in that respect on the Supreme Court of Ontario.

Section 26 of Bill C-187 provides for the repeal of the *Divorce Act* (Ontario) of 1930.

The proposed federal divorce legislation does not deal with the law of annulment at all. It does provide in section 5 (1) (*d*) that inability to consummate should be a ground for divorce, which would cover the

same situation as impotency now does in annulment. The same provision makes refusal to consummate a ground for divorce. In England, this latter matter has been treated as a ground for annulment.

In any event, none of the other grounds on which annulment proceedings can be based at present, are dealt with by Bill C-187.

The repeal of the 1930 statute therefore raises a number of questions:

1. Will Ontario be left without its law of annulment?

    A. Was the English law of annulment received in Upper Canada in 1792?

    B. If the answer to "A" is in the affirmative, was it superceded by the federal *Divorce Act* (Ontario) of 1930?

    C. If the answer to "A" is in the affirmative and the *Divorce Act* (Ontario) of 1930 is now repealed, would the law of England as it was received (and subsequently modified by provincial legislation) still be in existence?

2. If the English law of annulment was law in Ontario notwithstanding the repeal of the *Divorce Act* (1930), what courts would have jurisdiction and, if none possessed jurisdiction, how could they acquire it?

    A. Must it be taken as settled that, prior to 1930, Ontario courts had no jurisdiction in annulment proceedings?

    B. If the Ontario courts did not have jurisdiction, could they be given it by provincial legislation? (Laskin suggests that this is possible. See Canadian Constitutional Law, 3rd ed., pp. 818-820.)

3. In the event that the *Divorce Act* (Ontario) of 1930 is repealed, what would be the result with respect to section 10 of *The Matrimonial Causes Act* (R.S.O. 1960, c. 232)?

Certainly the simplest solution would be to amend section 26 of Bill C-187 so that the *Divorce Act* (1930) would be repealed with respect to divorce only. This would leave, however, a slight overlap with respect to inability to consummate.

III Ancillary Relief

Sections 10, 11 and 12 of Bill C-187 provide, both on an interim and final basis, for such matters as:

(i) maintenance payments by one spouse to another;

(ii) maintenance payments for the children; and

(iii) the custody, care and upbringing of the children.

It is the view of the Commission that these matters could well be left, as they are at present, to provincial legislation. Until now, these matters have been dealt with by the Provinces under the head of "Property and Civil Rights". The area of ancillary relief is one which is likely to be subject to continuing pressure for reform and it is more likely that progress would be made if this were a provincial matter. Individual provinces would be more likely to innovate and bring in reforms than the federal Parliament. If a provincial reform worked, then other provinces could be expected to follow suit. One good reason that the provincial authorities would be more active than the federal authority is that they are much closer to the problem. It is the provincial agencies that are concerned with the welfare of deserted wives and the children of broken homes.

An example of provincial innovation in the field of ancillary relief is the Family Law Project of the Commission, which deals with this as well as many other family law problems. The study on this subject, which is under preparation for the Commission, should be available later this year. The Commission believes that the federal government should be urged to refrain from entering this area of family law. If the federal government persists, the Commission will report further on the effect on the existing provincial law of alimony, maintenance and custody, both as independent and ancillary relief, when the Family Law Project is completed.

IV Domicile

There are a number of points raised by Bill C-187 which should be considered with respect to domicile.

1. Attention is directed to the substantial change in the law with regard to domicile as a basis for jurisdiction by Bill C-187. The relevant provision is:

> "5.—(1) The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,
>
> (*a*) the petition is presented by a person domiciled in Canada; and
>
> (*b*) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period.
>
> (2) Where petitions for divorce are pending between a husband and wife before each of two courts that would otherwise have jurisdiction under this Act respectively to entertain them and to grant relief in respect thereof,
>
> (*a*) if the petitions were presented on different days and the petition that was presented first is not discontinued within thirty days after the day it was presented, the

court to which a petition was first presented has exclusive jurisdiction to grant relief between the parties and the other petition shall be deemed to be discontinued; and

(*b*) if the petitions were presented on the same day and neither of them is discontinued within thirty days after that day, the Divorce Division of the Exchequer Court has exclusive jurisdiction to grant relief between the parties and the petition or petitions pending before the other court or courts shall be removed, by direction of the Divorce Division of the Exchequer Court, into that Court for adjudication.

(3) Where a husband or wife opposes a petition for divorce, the court may grant to such spouse the relief that might have been granted to him or to her if he or she had presented a petition to the court seeking that relief and the court had had jurisdiction to entertain the petition under this Act."

It will be noted that the Bill as introduced and passed by the House of Commons represents a marked departure from the provision in the draft bill accompanying the Joint Report. That provision read as follows:

"9.—(1) A husband or wife domiciled in Canada may institute proceedings praying for the dissolution or annulment of the marriage, and for ancillary relief, in any province with a court having jurisdiction to provide such relief, if the petitioner or the respondent has resided continuously in that province for a period of at least one year immediately preceding the presentation of the petition.

(2) For the purposes of this section,

(*a*) a husband has Canadian domicile if he is domiciled, in accordance with the existing rules of private international law, in any province of Canada; and

(*b*) a wife has Canadian domicile if she would, if unmarried, be domiciled, in accordance with the existing rules of private international law, in any province of Canada.

(3) The court has jurisdiction to grant the relief sought by a petition presented pursuant to subsection (1).

(4) *The Divorce Jurisdiction Act*, chapter 84 of the Revised Statutes of 1952, is repealed."

2. The proposed change would require a revision in the Ontario Rules of Practice pertaining to petitions for divorce in the Ontario courts. Under Bill C-187, the now accepted basis for jurisdiction of a provincial domicile is replaced by a Canadian domicile and pleadings and evidence would have to be directed to facts establishing a Canadian domicile.

For example, a couple renouncing their domicile of origin in emigrating from a foreign country with the present expectation of residing in Canada permanently may be indifferent as to the province in which they intend to settle. They have, however, a present fixed intention to reside in Canada. So long as they establish the required duration of residence in a particular province and the intention to remain in Canada, the courts of that province will have jurisdiction under the proposed legislation.

3. The acquisition of a Canadian domicile under the statute is limited to the purposes of the statute and does not apply to the general law. In the law of succession, for example, domicile in a province will continue to be the connecting factor. The main body of the law remains unchanged in this respect. The concept of the acquisition of a national domicile for purposes of divorce jurisdiction in a federal state is not novel. It was adopted in the Commonwealth of Australia in 1965 and apparently is working well.

4. Finally, the new legislation creates new problems with respect to the recognition of Ontario divorce decrees outside of Canada and the recognition of foreign decrees in Canada. (See sections 5, 14, 15 and 16.) The question of recognition is a very complicated one in the field of private international law and new principles are evolving. The Commission considers that these problems may well be left to the courts to work out rather than to seek solutions by legislative rules.

In conclusion, the Commission would point out that, in submitting reports in connection with its Family Law Project, it will deal with other principles of matrimonial law and with other aspects of jurisdiction in these matters, including judicial separations.

All of which is respectfully submitted.

H. Allan Leal,
Chairman

J. C. McRuer,
Commissioner

R. A. Bell,
Commissioner

W. Gibson Gray,
Commissioner

W. R. Poole,
Commissioner

January 19, 1968.